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Supreme Court of the United States.

OCTOBER TERM, 1906.

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No. 132.

CHARLES S. ELDER, PLAINTIFF IN ERROR,

v.

THE PEOPLE OF THE STATE OF COLORADO, ON THE INFORMATION OF GEORGE STIDGER, THE DISTRICT ATTORNEY OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO, ON THE RELATION OF CHARLES W. BADGLEY.

BRIEF FOR PLAINTIFF IN ERROR.

ROBERT H. ELDER,
MILTON SMITH,
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Counsel for Plaintiff in Error.

(19,931)

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STATEMENT OF CASE.

In 1901 the legislature of the state of Colorado submitted to the people of said state an amendment to the constitution thereof, designated as article XX, which was duly adopted by a vote of the people of said state, and which amendment, among other things, provides as follows:

"Section 1. The municipal corporation known as the city of Denver, and all municipal corporations and that part of the quasi-municipal corporation known as the county of Arapahoe, in the state of Colorado, included within the exterior boundaries of the

said city of Denver as the same shall be bounded when this amendment takes effect, are hereby consolidated and are hereby declared to be a single body politic and corporate, by the name of the 'City and County of Denver.' By that name said corporation shall have perpetual succession, and shall own, possess and hold all property, real and personal, theretofore owned, possessed or held by the said city of Denver and by such included municipal corporation, and also all property, real and personal, theretofore owned, possessed or held by the said county of Arapahoe, and shall assume, manage and dispose of all trusts in any way connected therewith; shall succeed to all the rights and liabilites, and shall acquire all benefits, and shall assume and pay all bonds, obligations and indebtedness of said city of Denver and of said included municipal corporations and of the county of Arapahoe; by that name may sue and defend, plead and be impleaded, in all courts and places, and in all matters and proceedings; may have and use a common seal and alter the same at pleasure; may purchase, receive, hold and enjoy, or sell and dispose of, real and personal property; may receive bequests, gifts and donations of all kinds of property, in fee simple, or in trust for public, charitable or other purposes; and do all things and acts necessary to carry out the purposes of such gifts, bequests and donations, with power to manage, sell, lease or otherwise dispose of the same in accordance with the terms of the gift, bequest or trust; shall have the power, within or without its territorial limits, to construct, condemn and purchase, acquire, lease, add to, maintain, conduct and operate, water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof, and any such systems, plants or works or ways, or any contracts in relation

or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county, which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary, as may by the charter be provided.

"The general annexation and consolidation statutes of the state shall apply to the city and county of Denver to the same extent and in the same manner that they would apply to the city of Denver if it were not merged, as in this amendment provided, into the city and county of Denver. Any contiguous town, city or territory hereafter annexed to or consolidated with the city and county of Denver, under any of the laws of the state, in whatsoever county the same may be at the time, shall be detached per se from such other county and become a municipal and territorial part of the city and county of Denver, together with all property thereunto belonging.

"The city and county of Denver shall alone always constitute one judicial district of the state.

"Section 2. The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided; but every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable. If any officer of said city and county of Denver shall receive any compensation whatever, he or she shall receive the same as a stated salary, the amount of which shall be fixed by the charter, and paid out of the treasury of the city and county of Denver in equal monthly payments.

"Section 3. Immediately upon the canvass of the vote showing the adoption of this amendment, it shall be the duty of the governor of the state to issue his proclamation accordingly, and thereupon the city of Denver, and all municipal corporations and that part of the county of Arapahoe within the boundaries of said city, shall merge into the city and county of Denver, and the terms of office of all officers of the city of Denver and of all included municipalities and of the county of Arapahoe shall terminate; except, that the then mayor, auditor, engineer, council (which shall perform the duties of a board of county commissioners), police magistrate, chief of police and boards, of the city of Denver shall become, respectively, said officers of the city and county of Denver, and said engineer shall be ex-officio surveyor and said chief of police shall be ex-officio sheriff of the city and county of Denver; and the then clerk and ex-officio recorder, treasurer, assessor and coroner of the county of Arapahoe, and the justices of the peace and constables holding office within the city of Denver, shall become, respectively, said officers of the city and county of Denver, and the district attorney shall also be ex-officio attorney of the city and county of Denver. The foregoing officers shall hold the said offices as above specified only until their successors are duly elected and qualified as herein provided for; except that the then district judges, county judge and district attorney shall serve their full terms, respectively, for which elected. The police and firemen of the city of Denver, except the chief of police as such, shall continue severally as the police and firemen of the city and county of Denver until they are severally discharged under such civil service regulations as shall be provided by the charter; and every charter shall provide that the department of fire and police and the department of public utilities and works shall be under such civil service regulations as in said charter shall be provided.

"Section 4. The charter and ordinances of the city of Denver as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver; but the people of the city and county of Denver are hereby vested with and they shall always have the exclusive power in the making, altering, revising or amending their charter, and, within ten days after the proclamation of the governor announcing the adoption of this amendment, the council of the city and county of Denver shall, by ordinance, call a special election, to be conducted as provided by law, of the qualified electors in said city and county of Denver, for the election of twenty-one taxpayers who shall have been qualified electors within the limits thereof for at least five years, who shall constitute a charter convention to frame a charter for said city and county in harmony with this amendment. Immediately upon completion, the charter so framed, with a prefatory synopsis, shall be signed by the officers and members of the convention and delivered to the clerk of said city and county, who shall publish the same in full, with his official certification, in the official newspaper of said city and county, three times, and a week apart, the first publication being with the call for a special election, at which the qualified electors of said city and county shall by vote express their approval or rejection of the said charter. If the said charter shall be approved by a majority of those voting thereon, then two copies thereof (together with the vote for and against), duly certified by the said clerk, shall, within ten days after such vote is taken, be filed with the secretary of state, and shall thereupon become and be the charter of the city and county of Denver. But if the said charter be rejected, then, within thirty days thereafter, twenty-one members of a new charter convention shall be elected at a special election to be called as above in said city and county, and they shall

proceed as above to frame a charter, which shall in like manner and to the like end be published and submitted to a vote of said voters for their approval or rejection. If again rejected, the procedure herein designated shall be repeated (each special election for members of a new charter convention being within thirty days after each rejection) until a charter is finally approved by a majority of those voting thereon, and certified (together with the vote for and against) to the secretary of state as aforesaid, whereupon it shall become the charter of the said city and county of Denver and shall become the organic law thereof, and supersede any existing charters and amendments thereof. The members of each of said charter conventions shall be elected at large; and they shall complete their labors within sixty days after their respective election.

"Every ordinance for a special election of charter convention members shall fix the time and place where the convention shall be held, and shall specify the compensation, if any, to be paid the officers and members thereof, allowing no compensation in case of non-attendance or tardy attendance, and shall fix the time when the vote shall be taken on the proposed charter, to be not less than thirty days nor more than sixty days after its delivery to the clerk. The charter shall make proper provision for continuing, amending or repealing the ordinances of the city and county of Denver.

"All expenses of charter conventions shall be paid out of the treasury upon the order of the president and secretary thereof. The expenses of elections for charter conventions and of charter votes shall be paid out of the treasury upon the order of the council.

"No franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified tax-paying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by said treas-

urer) of such submission by the applicant for said franchise. The council shall have power to fix the rate of taxation on property each year for city and county purposes."

"Section 8. Anything in the constitution of this state in conflict or inconsistent with the provisions of this amendment is hereby declared to be inapplicable to the matters and things by this amendment covered and provided for."

In pursuance of the authority conferred by the constitutional provisions above set forth, a charter was adopted by the people of the city and county of Denver on March 29, 1904, portions of which are as follows, to-wit:

"Section 24. The executive power of the city and county shall be vested in a mayor, sheriff, treasurer, auditor, attorney, clerk, assessor, recorder, coroner, county superintendent of schools, and in the departments and commissions herein created."

"Section 51. The treasurer shall receive, receipt for and keep the money of the city and county and pay out the same only on warrants as herein provided."

"Section 52. The treasurer, on receiving any money, except for taxes and assessments, shall make duplicate receipts therefor, upon the face of one of which shall appear the word 'original,' and upon the face of the other the word 'duplicate;' they shall be numbered, dated, specify the amount, on what account, from whom received, and into what fund or on what account paid. He shall enter upon the stub of such receipt a memorandum of the contents thereof, and deliver the receipt marked 'original' to the payor and that marked 'duplicate' to the auditor, who shall stamp thereon the date of its delivery to him, charge the treasury with the amount, and file the receipt in his office."

"Section 53. He shall keep an account with each fund, special or general, and when a warrant is drawn on any particular fund it shall be paid out of that fund only."

"Section 54. No money shall be paid out by the treasurer for any purpose except upon warrants drawn upon him by the auditor unless otherwise provided by this charter. Each warrant shall be registered by the auditor, countersigned by the head of the department or clerk of the court, respectively, under whom the claim or demand covered by such warrant originated. Each warrant shall show on its face the date of its issue, the date of the order of the council or such officer, to whom and for what purpose issued, and from what fund payable. Every warrant issued, as in this charter required, shall, when paid, be canceled with a punch cutting the word 'canceled' therein and the proper entry thereof made; Provided, The treasurer may pay the interest and principal on bonded indebtedness including special improvement bonds as the same become due without a warrant having previously issued therefor."

"Section 55. At the beginning of each calendar month, the treasurer shall report the transactions of his office during the previous month to the auditor, showing the amount of money received, from what source, and on what account, with a list of all city and county warrants, bonds and orders which have been redeemed by him or paid into the treasury as money due the city and county, which warrants, bonds, and orders shall accompany his reports for cancellation, which reports shall be audited by the auditor and certified by him to the council. The treasurer shall also make an annual report of the transactions of his office on or before the second Monday in January, and from time to time such other reports as may be required by the council. If the treasurer shall fail to report, as provided by this section, he shall forfeit

and pay to the city and county the sum of five hundred ($500) dollars for every such failure."

"Section 56. The treasurer shall, on or before the second Monday in January, April, July and October, make to the council and auditor a detailed verified statement of all his accounts and the state of each fund, which shall show all moneys received, from what source and for what purpose, and of all moneys paid out, and to whom and for what purpose. A summary of these quarterly reports shall be published by the auditor with the summary of his annual report."

"Section 57. The treasurer shall give a bond to the and county with sufficient sureties, w ties shall be responsible surety companies, pproved by the mayor and council, in the sum five hundred thousand dollars, and for such additional sum as the mayor and council shall require, conditioned as required by the general statutes relating to bonds of county treasurers, and as may be further required by ordinance, and for paying over to his successor in office all such sums of money belonging to the city and county as shall be in his hands, and to account for and turn over to his successor all moneys deposited with him for any cause whatsoever, and all city and county property which may come to his hands. The cost of said bonds shall be borne by the city and county, to be audited, allowed and paid out of the treasury as provided for the payment of other general expenses."

"Section 58. The treasurer shall, with the approval of the mayor and auditor, select annually, or oftener if necessary, one or more banks or banking institutions in the city and county which will pay the highest interest for the average current deposit of the city and county funds. Before any such deposit shall be made the bank shall give a bond to the city and county with such conditions and in such sum as may be determined by the mayor, auditor and

attorney, but not less than the maximum amount which shall be on deposit at any time. The sureties shall be approved by the mayor, auditor and attorney, and shall be other than the surety on the treasurer's bond. No amount which may be due any depository on account of any evidence of the city and county indebtedness shall be accepted by the treasurer as offset against his deposit with such bank. A verified quarterly statement shall be made to the mayor and auditor by the president or cashier of such bank, showing the amount of interest paid or to be paid by such bank for the use of the city and county funds, and upon failure to make such report after written demand the bank shall forfeit to the city and county the sum of five hundred dollars, and the deposit then remaining in such bank shall immediately be removed and another bank or banks selected as above provided. The surety on such bond shall be a responsible surety company."

"Section 59. The treasurer shall, in addition to performing the duties herein specifically required, perform such other duties not inconsistent with the laws of the state and this charter as the council may by ordinance require."

"Section 166. A general city and county election shall be held in the various precincts in the city and county of Denver on the third Tuesday in May, A. D. 1904, and every two years thereafter, by the qualified electors thereof."

"Section 167. At the first city and county election there shall be elected a mayor, sheriff, auditor, assessor, treasurer, clerk, recorder, coroner, county superintendent of schools, two judges of the county court, sixteen aldermen, seven supervisors, three justices of the peace, three constables."

"Section 168. The term of all elective officers, except as otherwise provided herein, shall commence on the first secular day of June following their elec-

tion, and, except as otherwise provided herein, shall be four years and until their successors are elected and qualified."

As above disclosed the charter created the office of treasurer of the city and county of Denver, and at the May, 1904, election, held in persuance thereof, the plaintiff in error was elected to that office for a term of four years, beginning with the first secular day of June, 1904. In obedience to section 2 of the article of the constitution above set forth, the treasurer of the city and county of Denver was designated as the officer who should perform the acts and duties required of county treasurers to be done under the constitution and general law of the state. This was by virtue of section 156 of the charter, which is as follows:

"Section 156. Except as otherwise herein provided, the officers who shall respectively perform the acts and duties required of county officers to be done by the constitution and the general laws, in all cases not specifically provided for, so far as applicable, shall be as follows: The county judges shall perform the acts and duties required of county judges; justices of the peace, the acts and duties required of justices of the peace; constables and deputy constables, the acts and duties required of constables; the engineer, the acts and duties required of county surveyor; the board of supervisors, the acts and duties required of boards of county commissioners; the board of supervisors shall act as a board of equalization and perform the acts and duties required of a board of county commissioners when sitting as a board of equalization; the assessor, the acts and duties required of county assessor; the treasurer, the acts and duties of a county treasurer; the sheriff, the acts and duties required of sheriff; under-sheriffs, the acts and duties required of under-sheriffs; deputy

sheriffs, the acts and duties required of deputy sheriffs; recorder, the acts and duties required of county clerk as ex-officio recorder; the coroner, the acts and duties required of coroner; the election commission, the acts and duties required of a board of county commissioners, county clerks and justices of the peace in all matters pertaining to registration and elections.

"In case no officer has been specially mentioned to perform the duties of any county officer, or in case any new county office is created, then such office shall be filled by appointment by the mayor, who shall appoint thereto some official of the city and county, who shall thereafter perform the acts and duties required by the constitution or by the general laws to be done by such county officer."

The plaintiff in error qualified as required by law, and entered upon the discharge of the duties of his said office. In November, 1904, at the general election, the relator, Charles W. Badgley, was a candidate in the city and county of Denver for the alleged office of county treasurer, and received a certificate of election. He caused to be instituted a proceeding in *quo warranto* against the plaintiff in error to oust him from said office, or at least to oust him from the discharge of those duties imposed upon a county treasurer under the constitution and general law of Colorado.

The district court of the city and county of Denver, in which said action was instituted, sustained a demurrer to the amended complaint, and, the relator electing to stand on his pleading, said action was dismissed. An appeal was prosecuted to the supreme court of the state of Colorado, which reversed the judgment of the lower court, and itself entered a final

judgment in favor of the relator. The present action was heard in conjunction with various other causes involving the title to other offices which had been filled at the May election held in pursuance of the charter of the city and county of Denver, and the main opinion was rendered in the case of People ex rel. v. Henry V. Johnson, which opinion is set forth at pages 21 to 32 of the transcript, and the judgment of the district court in the present action was reversed for the reasons stated in People ex rel. v. Johnson, as appears from the opinion of the court found at page 20 of the transcript.

Upon the hearing in the district court, and in the supreme court also, as will more fully appear from the record and opinion of court therein, it was contended by the relator that section 2 of article XX of the constitution was and is invalid as a part of the constitution of the state of Colorado, as being in conflict with the enabling act of congress, under which the state of Colorado was organized as a state, and which provided that the government of the state of Colorado should be republican in form, and further as being also in conflict with that provision of the constitution of the United States which provides that the United States shall guarantee to every state in the union a republican form of government, and in said final judgment the supreme court of the state of Colorado so decided and held that said section was and is in conflict both with the said act of congress and said provision of the constitution of the United States, and that it was not within the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitu-

tion of the United States, to incorporate such provision in their constitution.

In said suit relator further contended, and the court so decided, that said article XX was and is invalid as a part of the constitution of the state of Colorado, in so far as it vests in the people of the city and county of Denver power to create by their charter the office of treasurer of the city and county of Denver, and to prescribe that the officer to fill such office should be elected in the month of May, 1904, and thereafter at stated intervals as in said charter prescribed, as being in conflict with said provision of the constitution of the United States, and in excess of the constituent power of the people of the state of Colorado, as given, defined and limited by the constitution of the United States, and as being destructive of a republican form of government in the state of Colorado.

In said suit said relator further contended, and said supreme court in said judgment so decided, that said article XX, and particularly section 2 thereof, was invalid as a part of the constitution of the state of Colorado, insofar as it vested in the people of the city and county of Denver authority by their charter to fix the term of office of the officer who should, within said city and county of Denver, perform the duties and functions imposed by the constitution and general laws of the state of Colorado upon county treasurers, as being in conflict with said provision of the constitution of the United States, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

In said suit said relator further contended, and the court in its final judgment so decided, that said article XX, and particularly section 2 thereof, was and is invalid, insofar as it authorizes the people of the city and county of Denver to provide by their charter for the election of an officer who should perform, within said city and county, the duties and functions required by the constitution and general laws of the state of Colorado of county treasurers, at a time chosen by themselves, and not at the time provided in the constitution of the state of Colorado generally for the election of county treasurers, as being in conflict with said provision of the constitution of the United States, and as being destructive of a republican form of government, and as being in excess of the constituent power of the people of the state of Colorado as such power is given, defined and limited by the constitution of the United States.

Said relator further contended, and the court in its final judgment so decided, that said article XX was and is invalid as a part of the constitution of the state of Colorado, insofar as it provides for the establishment of a government in the territory of the city and county of Denver, in abrogation of general rules of government, particularly those relating to the administration of county affairs set out in the constitution of the state of Colorado, as being in conflict with said provision of the constitution of the United States, and as being destructive of a republican form of government, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

That by such decision the supreme court of the state of Colorado has absolutely eliminated said section 2, and portions of section 3, from the constitution of the state of Colorado, and by thus holding that the people of the state of Colorado had no power to enact a constitutional provision such as that embraced in sections 2 and 3 of article XX, said supreme court held the election of your petitioner to the office of treasurer of the city and county of Denver to be invalid, and entered final judgment of ouster as aforesaid.

On account of said judgment we have filed the following assignment of errors, to wit:

I.

The court erred in holding that the people of the state of Colorado do not have the authority, under the constitution and laws of the United States to enact article XX as a part of or as an amendment to their state constitution.

II.

The court erred in holding that the people of the state of Colorado do not have the authority, under the constitution and laws of the United States, to enact section 2 of article XX as a part of or as an amendment to their state constitution.

III.

The court erred in holding that the people of the state of Colorado do not have the authority under the constitution and laws of the United States to

enact section 3 of article XX as a part of or as an amendment to their state constitution.

IV.

The court erred in holding that article XX of the constitution of the state of Colorado is in conflict with and in contravention of that provision of the constitution of the United States which guarantees to every state a republican form of government.

V.

The court erred in holding that section 2 of article XX of the contstitution of the state of Colorado is in conflict with and in contravention of that provision of the constitution of the United States which guarantees to every state a republican form of government.

VI.

The court erred in holding that section 3 of article XX of the constitution of the state of Colorado is in conflict with and in contravention of that provision of the constitution of the United States which guarantees to every state a republican form of government.

VII.

The court erred in holding that article XX of the constitution of the state of Colorado is in conflict with and in contravention of that act of congress known as the Colorado enabling act.

VIII.

The court erred in holding that section 2 of article XX of the constitution of the state of Colorado is in conflict with and in contravention of that act of congress known as the Colorado enabling act.

IX.

The court erred in holding that section 3 of article XX of the constitution of the state of Colorado is in conflict with and in contravention of that act of congress known as the Colorado enabling act.

X.

The court erred in holding article XX of the constitution of the state of Colorado to be invalid, as being destructive of a republican form of government in the state of Colorado.

XI.

The court erred in holding section 2 of article XX invalid, as being destructive of a republican form of government in the state of Colorado.

XII.

The court erred in holding section 3 of article XX invalid, as being destructive of a republican form of government in the state of Colorado.

XIII.

The court erred in holding that the people of the state of Colorado do not have the authority, under

the constitution and laws of the United States, to provide in their state constitution that the people of the city and county of Denver, one of the subdivisions of said state, may designate of their officers to be provided by their charter, one thereof to perform the acts and duties required of a county treasurer to be done by the constitution and general laws of the state.

XIV.

The court erred in holding that to concede the authority in the people of the state of Colorado under the constitution and laws of the United States, to grant by an amendment to their state constitution to the people of the city and county of Denver the power to designate in a charter to be provided by themselves, an officer of their choosing to perform the acts and duties required of a county treasurer to be done under the constitution and general laws of the state of Colorado, is destructive of a republican form of government.

XV.

The court erred in holding article XX of the constitution of the state of Colorado invalid, in so far as it vests in the people of the city and county of Denver authority to create by their charter the office of treasurer of the city and county of Denver, and to prescribe that the officer to fill such office should be elected in the month of May, 1904, and every four years thereafter, as in said charter prescribed, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being in ex-

cess of the constituent power of the people of the state of Colorado as given, defined and limited by the constitution of the United States, and as being destructive of a republican form of government in the state of Colorado.

XVI.

The court erred in holding article XX, and particularly section 2 thereof, invalid as a part of the constitution of the state of Colorado, in so far as it vested in the people of the city and county of Denver, by their charter, authority to fix the term of office of the officer who should perform within said city and county of Denver the duties and functions imposed by the constitution and general laws of the state of Colorado upon county treasurers, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

XVII.

The court erred in holding article XX, and particularly section 2 thereof, invalid as a part of the constitution of the state of Colorado, in so far as it authorized the people of the city and county of Denver to provide by their charter for the election of an officer who shall perform within the city and county of Denver the duties and functions required by the

constitution and general laws of the state of Colorado of county treasurers, at a time chosen by themselves, and not at the time provided in the constitution of the state of Colorado generally for the election of county treasurers in the counties throughout the state, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

XVIII.

The court erred in holding article XX, and particularly section 3 thereof, invalid as a part of the constitution of the state of Colorado, in so far as said article provided that the county treasurer of the former county of Arapahoe, in office at the time said article went into effect, should become the treasurer of the city and county of Denver, and should continue in such office until his successor should have been duly elected and qualified thereunto, as provided by article XX, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

XIX.

The court erred in holding article XX invalid as a part of the constitution of the state of Colorado, in so far as it provides for the establishment of a government in the territory of the city and county of Denver, in abrogation of the general rules of government, particularly those relating to the administration of county affairs, set out in the constitution of the state of Colorado, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

XX.

The court erred in holding that it is not within the authority of the people of the state of Colorado, under the constitution and laws of the United States, for them to enact an amendment to their constitution for a specific purpose, and thereby have said special constitutional provision take the place of and be effective in lieu of any general constitutional provisions of the state, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state

of Colorado, as such power is given, defined and limited by the constitution of the United States.

XXI.

The court erred in holding article XX to be invalid as a part of the constitution of the state of Colorado, in so far as it provided a scheme of local government in and for the territory embraced within the city and county of Denver, which government should perform therein both municipal and county functions, as being in conflict with that provision of the constitution of the United States which guarantees to every state a republican form of government, and as being destructive of a republican form of government in the state of Colorado, and as being in excess of the constituent power of the people of the state of Colorado, as such power is given, defined and limited by the constitution of the United States.

ARGUMENT.

THE QUESTION OF JURISDICTION.

This court has jurisdiction of this issue. The theory of jurisdiction is as follows: (1) The people of Colorado, in amending their constitution, exercised an authority under the United States; (2) in this case, the validity of that authority exercised was actually drawn in question; (3) it was decisive of the issue and there was no other matter adjudged by the court below broad enough to sustain the judgment; (4)

the decision below was against the validity of that authority exercised; (5) the question here is not for the political departments of the federal government but for this court.

MERITS OF THE CASE.

The judgment below was flagrantly erroneous. Article XX of the constitution of the state of Colorado, and particularly section 2 thereof, authorized the city and county of Denver in its charter to create the office of treasurer, and to impose upon the incumbent thereof the obligation of performing the acts and duties required of a county treasurer to be performed under the constitution and general laws of the state; and in the exercise of such authority, the guarantee of a republican form of government by the constitution of the United States has been in no wise disturbed or violated.

The questions above suggested will be discussed in the order of their statement.

I.

IN AMENDING THEIR CONSTITUTION THE PEOPLE OF COLORADO EXERCISED AN AUTHORITY UNDER THE UNITED STATES.

The doctrine of this point is that, in our political system, our states (so-called) are really not states, but merely local government; that they are not sovereign,

and exercise no powers of sovereignty, but are purely local government; that, not being sovereign but purely local government, they must have received the authority from some superior to exercise these local powers of government; that they did receive such authority from their superior, to wit, the sovereign, in our system, viz.: the people of the United States considered as a political unit—as a collectivity.

By the term "sovereignty" is meant supreme, absolute, unlimited power. In every political system there must always be such power lodged somewhere; there must always be some power that can speak the final word in case of dispute. This ultimate authority is sovereignty.

Moreover, this power must be supreme; if there exists any power superior to it, it is the *superior* power that is sovereign. It must be absolute and unlimited; if there exist any restriction or limitation upon it, the power that superimposes the restriction or limitation is sovereign. A "limited sovereignty" never existed. It is a contradiction of terms. The idea that sovereignty can limit itself and thus become "limited sovereignty" is likewire erroneous; for, *self limitation is no limitation*, because if a limitation be self-imposed it can at will be removed.

The old defenders of the divine right of kings had a correct idea of the nature of sovereignty.

"For as kingly power is by the law of God," says Filman (Patriarcha), "so it hath no inferior law to limit it."

Mr. Justice Chase in this court, Ware v. Hylton, 3 Dall., at page 236, expressed the same idea, the exact idea here contended for, when he said:

"There can be no limitation on the power of the people of the United States. By their authority the *state constitutions were made*, and by their authority the constitution of the United States was established; and they had the power to *change or abolish the state constitutions*, or to make them yield to the general government and to treaties made by their authority."

By the term "state" is meant the political form, i. e., the particular individual, or organization, which for the time being holds and exercises this supreme power—sovereignty. A state alone is sovereign; sovereignty is an attribute of a state only; the state is sovereign and sovereignty is the power of the state.

In the term "sovereignty" we get the idea of the nature, extent and character of the power; in the term "state" we get the idea of the particular form, organization, through which is exercised this power. These two terms—state and sovereignty—are then correlative. Since sovereignty is unlimited, absolute power, the power of the state is unlimited and absolute. As no limitation can be put on sovereignty, none can be put on the power of the state. Governments are often limited; states never.

If one person exercises this power, the state is a monarchy; if a few persons, the state is an aristocracy; if the mass of the population, the state is a democracy.

1 Burgess Pol. Sci. & Comp. Const. Law (Character of a State), pages 51-58.

Id. (No federal or composite state), pages 79-82.

Id. (History of Formation of our Const.), pages 98-108.

Id. (The organization of the State), pages 142-154.

Id. (Source of Liberty), pages 175-177.

2 Burgess Pol. Sci. & Comp. Const. Law (Immediate or Representative Govt.), pages 1-4.

Id. (Dual Govt.), pages 5-6.

Id. (Confusion in ideas between State & Local Govt.), pages 7-8.

Id. (U. S. *Govt.* Fed.—*State*, not Federal), page 18, section 2.

Id. (Commonwealths not sovereign; hence suable), pages 330-1.

Id. (Advantages of U. S. Judiciary), pages 363-366.

Davis El. Inter. Law (Sovereignty unlimited), 34-9, et seq.

Case of Exchange (Sovereignty unlimited), 7 Cranch., 116.

Wheaton, Part 1 (Sovereignty unlimited), chapter 2, sections 20-1.

Vattel Liv. 1, Ch. 3 (Sovereignty unlimited), sections 31-7.

1 Halleck, chapter IV (Sovereignty unlimited), sections 1-3, chapter 7.

Manning, Law Nations (Sovereignty unlimited), 92-3.

Black Const. Law (Sovereignty unlimited), 16-26.

Cooley Const. Law (Sovereignty unlimited), chapter 1.

2 Curtis Const'l Hist. (Sovereignty unlimited), 520-1.

Abbott, "Judge & Jury," pages 4-7.

Webster Argument in Luther v. Borden (1 Veeder Legal Masterpieces), pages 560-2.

1 Oppenheim Inter. Law, sections 66-70.

Tiffany, Govt. & Const. Law (Little & Co., Albany, 1867), pages 41-53, 298-326.

Note, therefore, that a state has an international character and work to do. From the view both of history, political science and of law, it is an independent organization in world politics. It is an international unit. Within its own borders, its functions are to establish government and to provide for other local needs. Without its borders, in the economy of the world, its functions are to declare war (if necessary), to make treaties, to protect the integrity of its own organization, and, according to its own will and in its own way, aid in the civilization of the world.

Plainly, then, the people of Colorado do not constitute a state. They exercise no supreme, absolute, unlimited power. Above them is a power that limits them, that restricts them, that, indeed, empowered them originally, and still empowers them, to act. By an enabling act of congress alone were they authorized originally to act in their present form. But, in their own territory, their authority is much limited. Their government can only be republican in form; they can deprive no man of life, liberty or property without due process of law; they can not impair the obligations of contracts; they can not coin money;

they can not declare war; they can not make treaties; they must submit to all the restrictions placed upon them by the constitution of the United States and by all laws of congress enacted in conformance therewith. Moreover, this subjection to a superior power is not imposed on Colorado alone, but is common to all our so-called states. It strips them of any character of statehood, and fixes once for all their status as local administration merely. Every one of them is authorized in and subject to the constitution of the United States. "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law, of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." (Article VI, section 2.)

Where, then, in our system, does sovereignty repose? As no one of our so-called states is sovereign, so the government at Washington is not sovereign. Its jurisdiction, legislative, executive and judiciary, is likewise limited and restricted. The government at Washington, too, has received its authority from a higher power, viz.: the power that made the constitution of the United States; the power that sustained it in civil war, when it demonstrated, by force of arms, the sovereignty of the whole people over and above the so-called states that would have seceded; the power that can now change that constitution to suit itself, make the government at Washington anything it pleases, make the government of any of our so-called

states what it pleases, *by the simple process of amendment*, or even disorganize them altogether.

This function, providing for the government, central and local, and, as incidental thereto, prescribing the sphere upon which governmental power, central or local, shall not intrude to the detriment of the liberty of the individual, is par excellence the function of the state, of sovereignty. (1 Burgess Pol. Sci. & Comp. Const. Law, page 89.) Every true state does this by its constitution, whether written or unwritten, providing therein for government, and, also, unless the whole power of sovereignty is turned over to government, for liberty, as well Government and the state are not the same. Government is the creature, the agent of the state. The state makes the constitution, both the constitution of liberty and of government, while the government makes the laws.

This constitution-making power, in our system, is lodged in the people of the United States, "We, the people of the United States," considered as a political unit.

It follows, hence, that the so-called states in our system are not sovereign; that they exercise no sovereign powers, but local governmental powers; that Colorado, therefore, not being independent, must act under some authority, and that the only authority superior to her is the "People."

1 & 2 Burgess, supra.

1 Wilson's Works, 321-5.

McCulloch v. Maryland, 4 Wheat., 403-4.

Davis El. Inter. Law, 32-3.

Black Const'l Law, 16-26.

Farrar Man'l Const., 37.

2 Curtis Const'l Hist., 520-1.

Bliss on Sovereignty, 73-4.

2 Curtis Const'l Hist., 71-4.

Martin v. Hunter, 1 Wheat., 304, 324.

Von Holst Const. Law U. S., pages 39-44.

Justice Miller's Lectures on Const., pages 38-58.

Abbott "Judge & Jury," supra.

Webster, Argument in Luther v. Borden, supra.

Woolsey, Inter. Law, sections 36-37.

Hence it follows that Colorado in amending her constitution exercised an authority under the United States.

II.

IN THIS CASE, (a) THE VALIDITY OF THAT AUTHORITY EXERCISED WAS ACTUALLY DRAWN IN QUESTION; (b) IT WAS DECISIVE OF THE CASE AND THERE WAS NO OTHER MATTER ADJUDGED BY THE COURT BELOW BROAD ENOUGH TO SUSTAIN THE JUDGMENT; AND (c) THE DECISION BELOW WAS AGAINST THE VALIDITY OF THAT AUTHORITY.

See opinion below, Record, pages 21-31.

The people of Colorado, by due process, enacted and promulgated amendment XX to their constitution. There has never been any pretense or issue that for any reason of form or procedure the amendment

is invalid. In accordance with this amendment, a charter was adopted. There has not been any pretense or issue that for any reason of form or procedure this charter is invalid. There could be none. There was no question of statutory construction here. There could be none. The terms of the charter are all too clearly within the limits of the amendment for this. Such being the fact, no untenable construction can be resorted to to defeat the jurisdiction of this court. (Terre Haute R. R. Co. v. Indiana, *194* U. S., 579, opinion by Holmes, J.). Since the charter was within the amendment and the amendment duly adopted and promulgated by the people, it would seem that both were law in Colorado, *unless for some reason the people of Colorado had no power to make this amendment to their constitution.*

This was the sole ground of attack; the sole question litigated; the sole question that *could* have been raised here; and it was the sole ground of decision by the court, which held the amendment invalid as being in conflict with article IV, section 4, of the constitution of the United States, that is—the court decided against the validity of an authority exercised under the United States, to wit: the authority of the people of Colorado to amend their constitution by adopting amendment XX.

III.

THE QUESTION HERE IS A JUDICIAL QUESTION; IT IS NOT ONE FOR THE POLITICAL DEPARTMENTS OF GOVERNMENT, BUT IS PROPERLY IN THIS COURT FOR DECISION.

Luther v. Borden, 48 U. S., 1, 34.
Taylor v. Beckham, 178 U. S., at 571-2.
Boyd v. Thatcher, 143 U. S., 135.
Kennard v. Louisiana, 92 U. S., 480.
In re Duncan, 139 U. S., 449.
Texas v. White, 7 Wall., 700.
Gunn v. Berry, 15 Wall., 610.

Luther v. Borden, 48 U. S., 1, 34, is not a precedent opposed to this. There the question was whether the revolutionary government of Dorr had, for a period before 1843, superseded the government that had been recognized since Charles II. as the legitimate government of Rhode Island. The Dorr government was based on a constitution framed by a convention elected without the sanction or pretense of sanction of any law. It was purely extra-legal. It was the product of a popular uprising for suffrage reform. It was purely revolutionary, because it had no basis in law. Dorr and his friends claimed no justification in any law but "natural law"—the inherent right of a population (as they expressed it) to rise up, when dissatisfied, overturn existing government and form government to suit themselves. The question in Luther v. Borden, then, was whether this revolution-

ary constitution and government had overturned the then existing government in Rhode Island.

There was no question there whether the form of either government was republican. There was no question whether any provision of the federal constitution had been violated. These questions were not even hinted at in argument or opinion. The sole dispute was whether a revolutionary government could be the legal government. This court held it had no jurisdiction to answer, because it belonged to the political departments of our central government to decide which of two contending governments, whether foreign or at home, is the legitimate one, and to decide whether in any territory there is government or not.

This decision makes Luther v. Borden authority for the proposition that government in our so-called states is an authority exercised under the United States, since without the recognition of the political departments of the United States there can be no government in them at all that can participate in our federal system—no representatives, no senators, no appeal to this court.

But the court also held that the political departments having once recognized a local government in a so-called state as legitimate, it was binding on all departments of government, on the other so-called states, and even this court.

In this case at bar there is no issue over the legitimacy of the governmental establishment in Colorado. The government in Colorado is the constitutional, legitimate government there. The political departments have recognized it as such, do now. This court must, then (Luther v. Borden), recognize it as such.

The question here is whether an act of that recognized, legitimate government violates a provision of the constitution of the United States.

What the framers of the federal constitution meant by the phrase, in article IV, section 4, "republican form of government," is purely a judicial question—one of legal interpretation and construction. This court is made by our constitution the interpreter thereof (Constitution, article III, section 2). Those authors must have had a distinct set of ideas in mind when they used the phrase. Whether what the recognized government in Colorado has done is in harmony or out of harmony with those ideas, is also a judicial question, because it also is one of legal interpretation and construction.

"But when the trial is in the courts, it is a case; and, if a defense is interposed under the constitution or laws of the United States, and is overruled, then * * * this court has jurisdiction."

Taylor v. Beckham, 178 U. S., 548, at 571.

They are questions that congress and the executive, by their very character, can not answer. They must come to this court. They are referred to it by the constitution itself.

Taylor v. Beckham, 178 U. S., 548, is not a precedent opposed to this. This case arose out of the contest in 1899-'90 over the governorship of Kentucky. The election was contested. By the constitution and laws of Kentucky the general assembly was the exclusive judge of the contest. They sat and heard the contest; they decided. There was no contention whatever that the government in Kentucky was not repub-

lican in form. (See page 574.) There was no contention that any provision of the Kentucky constitution or any law of Kentucky, or any procedure or process authorized by the government of Kentucky violated the republican form. (See page 574.) The complaint was that the general assembly gave corrupt judgment; and that this dishonest judgment tended to violate the republican principle. Because their complaint was simply that their officials had acted dishonorably, this court (page 580) referred them to the "august tribunal of the people" of Kentucky for redress. Of course, every dishonest act in office violates the republican principle, but would not give this court jurisdiction. The constitution guarantees a government that is republican in form, i. e., organized after a republican pattern. There process and procedure were republican in form; so no question under the constitution arose. This provision (article IV, section 4) authorizes a look into the *structure* of the government only.

True, in this case, the court said: "It was long ago settled that the enforcement of this guarantee (republican form) belonged to the political department" (page 578), and cited *Luther v. Borden*. But this was clearly a hurried comment and pure *dictum*. As shown above, *Luther v. Borden* did not settle any such thing, and the learned court's statement of what was there decided (pages 578-9) shows that it (*Luther v. Borden*) was not at all in point with *Taylor v. Beckham* because there was no contest in Kentucky between two governments and no question at all as to the validity of her constitution or laws. (Page 574.)

IV.

THE WHOLE OF THE ABOVE VIEW AS TO THE NATURE OF SOVEREIGNTY, THE CHARACTER OF A STATE, AND THE RELATIONS EXISTING BETWEEN THE FEDERAL GOVERNMENT, STATE GOVERNMENTS AND THE CONSTITUENT POWER OF THE PEOPLE OF THE UNITED STATES, ARE WELL BORNE OUT BY OUR CONSTITUTIONAL HISTORY.

The articles of confederation preceded our constitution. They provided (Article II, that each state should retain its "sovereignty, freedom and independence." They provided, also (Article XIII, that the union should be perpetual, and that no alteration should be made in the articles of confederation unless such alteration be agreed to by a congress of the United States and afterwards confirmed by the legislatures of every state.

Any change in that fundamental law which did not proceed according to the formalities and receive the sanctions prescribed thereby was necessarily illegal—i. e., revolutionary. This was the character of our present constitution. It was the product of revolution, because it was not authorized by and adopted according to any existing law. It changed not only the whole frame, but the very fundamental principles of our national organization.

The convention which framed our constitution was only authorized to propose amendments to the articles of confederation. It the authority given really went further than this, still it contemplated

ratification in the legal manner. No other authority could have been granted. Any other would have been extra-legal. Instead of proposing amendments to the articles, the convention constructed an entirely new document. It disregarded the mandate of the articles of confederation as to ratification; disregarded the authorities of the legislatures of the states to sanction; and passed the document on to conventions of the people themselves, *as the original source of power and the real sovereign of the nation*, for ratification.

Moreover, it prescribed a revolutionary mode, namely, that the ratification of conventions in nine states should establish the new government. That is to say, in violation of the articles of confederation, not only was a *new government to be established* on the American soil; but, in violation of the same sacred law, *the government then existing was to be torn down*. This certainly was revolutionary. As matter of history this is exactly what happened. Before the conventions in all the states had ratified the constitution the old government was destroyed and the new government was set up.

This revolutionary power which proceeded thus and tore down the existing government and established a new government *in spite of existing law*, and imposed its will, through our present constitution, upon the whole body of the people of the United States, irrespective of the geographical divisions in which they happened to reside, was the sovereign, the supreme power of the land; and no one nowadays, at any rate, will dispute that that power emanated directly from the people of the United States, considered in their collective capacity.

Acting, as they were, outside of the limitations of law, necessarily they were supreme and unlimited in power, for only the prescripts of law can impose any limitation upon a political organization. Such self-imposed restrictions as prudence might dictate are not, in public law, limitations at all. This power, then, exercising its free will, without limitation, capable of prescribing whatever it pleased as to the governments, national and local, authorized a federal system by which certain governmental powers were to be exercised by the people in their local divisions, and other more general governmental powers should be exercised by a central government over the whole territory of the United States. It will be noted, too, surely no student of our constitution will deny this, that this same power to this day, should it so will, could, *by the mere process of amendment*, change the construction of the local governments in the various states to suit itself, or of the central government either. If such change were incorporated in our constitution, and any state objected thereto, its only recourse would be to resort to war in defense of its supposed rights; when it would be either speedily subjected to the ruling power, or, being joined by other dissatisfied states, draw to itself sufficient strength to overturn the existing government and to establish a new government upon a new principle of sovereignty.

This was what was attempted during the civil war. There never had been a "compact" or "agreement" between sovereign states under our constitution, as is shown by the above historical outline. The states were absolutely subject to the political power of the people of the United States. Those states

which disputed this went to war. They were subjected. This established the principle here contended for. After the war the constitution was amended without their participation even, and without their sanction, though they were afterwards brought back into the union by the supreme power of the land. This principle was further enforced by the reconstruction acts of congress and the reconstruction administrations in the southern states, including anti-slavery amendments to their local constitutions forced upon them.

The real lesson of the civil war is that the people of the United States are sovereign; that their power is absolute and supreme, and that the states are merely local government operating under and by the authority of the United States.

Art. of Confed., articles II, XIII.

Const. U. S., article VIII.

1 Burgess Pol. Sci. and Comp. Const. Law, pages 67, 98-108.

McLain, Const. Law, pages 32-3.

Flanders Const. U. S., pages 34-6.

Farrar, Manual Const., Ch. 39, section 569 et seq.

Webster, Argument, *supra*, pages 564-5.

Walker, "Making of Nation," pages 20-30, 37-8.

Burgess, "Reconstruction & the Const." (discussing the state in the federal system), Ch. I et seq.

1 Curtis Const'l Hist., pages 364-5, 367.

McCulloch v. Maryland, 4 Wheat., 316, 404.

Gibbons v. Ogden, 9 Wheat., 1, 187.

Dred Scott v. Sanford, 19 How., 393, 441.

V.

THE WHOLE OF THE ABOVE VIEW IS ALSO JUSTIFIED BY AN EXAMINATION OF THE CONSTITUTION OF THE UNITED STATES. IT IS THE ONLY VIEW THAT *IS* JUSTIFIED BY THE CONSTITUTION. ON NO OTHER THEORY CAN ALL OF THE PROVISIONS OF THE CONSTITUTION BE RATIONALLY CONSTRUED.

The preamble states "We, the people of the United States," ordain the constitution. This cloaked a new idea—that the people of the United States irrespective of their local geographical lines had a political entity. The people then proceeded to devise our scheme of government. They prescribed carefully what powers the congress should exercise, and what it should not exercise. They prescribed with care what the executive department should be and what powers it should exercise and what powers it should not exercise. They prescribed with care what the constitution of the judiciary should be, and what powers it should exercise and what powers it should not exercise. They proceeded carefully to prescribe what the local governments in the states should be, what their form should be (republican), and what powers they

should exercise and what powers they should not exercise. The people did all this, and it was nothing more than their resolution, formally expressed, that these things should be as written down, that they have so existed from that day unto this, and now are.

Chisholm v. Georgia, 2 Dall., 419, at pages 449; 457.

Id., Justice Jay, at pages 470-1.

Ware v. Hylton, *supra*, at pages 236-7.

1 Davis, "Rise & Fall Confed. Govt.," at page 155.

Webster, Speeches, 8th Ed., volume II, pages 174-6.

VI.

ARTICLE XX OF THE CONSTITUTION OF THE STATE OF COLORADO AUTHORIZED THE CITY AND COUNTY OF DENVER BY ITS CHARTER TO CREATE THE OFFICE OF TREASURER, AND TO IMPOSE UPON THE INCUMBENT THEREOF THE OBLIGATION OF PERFORMING THE ACTS AND DUTIES REQUIRED OF A COUNTY TREASURER TO BE PERFORMED UNDER THE CONSTITUTION AND GENERAL LAWS OF THE STATE, AND IN THE EXERCISE OF SUCH AUTHORITY THE GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT BY THE CONSTITUTION OF THE UNITED STATES HAS BEEN IN NO WISE DISTURBED OR VIOLATED.

Article XX created the city and county of Denver. It carved a piece of territory out of a pre-existing subdivision of the state, and named it the city and county of Denver, and declared it to be a single body politic and corporate. The constitution then consolidated the portion of the old county thus carved out, the former city of Denver, and some half dozen outlying towns. Section 3 of said article provides for the transfer of government from the old entities into the new, and provides for the temporary government of the city and county during the time that must elapse between the proclamation announcing that article XX had been adopted, and the time when officers of the city and county would be elected after the adoption of a charter.

Nothing could more forcibly illustrate the purpose respecting the consolidation of the city and county than the section mentioned. It not only consolidated into one entity the county and the municipalities aforesaid, but the agencies of government within said territory as well. It was not the purpose in thus consolidating the agencies of government essentially to change the government itself. Governmental functions appertained to said territory after the promulgation of article XX no less than had been the case throughout the previous history of the state. What the constitution did was merely to change the machinery by which the governmental functions were to be performed. There had always been a sheriff in each county of the state. The constitution had required it; but within the city and county of Denver, and during the interval between the promulgation of article XX and the adoption of the charter, the constitution—not the legislature, but the constitution itself—expressly provided that there should be no sheriff. The constitution did not say that those duties attaching to the office of sheriff should be abolished within said territory; it did not say that the functions of government required by the constitution and general law of the state to be performed by sheriffs should cease to exist; but it did declare that the man who had been the chief of police of the old city of Denver should become the chief of police of the city and county of Denver, and should be *ex-officio* sheriff. Here is a clear case of the imposition by the constitution itself upon a municipal officer of county duties and county functions.

During this same period the council of the old city of Denver, the constitution declared, should be

the council of the city and county of Denver. This council was also required to perform the duties of a board of county commissioners. The duties imposed by the constitution and general law of the state upon boards of county commissioners were not abolished within the city and county of Denver; but the constitution did change the agency by which those duties were to be performed. Thereafter and until other provision was made those duties and functions were to be performed by a city council.

The engineer of the old city of Denver was declared to be the engineer of the city and county of Denver, and the constitution also declared that he should be *ex-officio* surveyor. The duties imposed by general law upon surveyors were not affected. They were simply transferred to a different official.

The clerk and ex-officio recorder was to become such officer for the city and county of Denver. A city clerk as such was no longer a necessity; but the clerk and ex-officio recorder of the old county of Arapahoe became that officer of the city and county of Denver, and also assumed the duties previously appertaining to the city clerk.

The treasurer of the old county became the treasurer of the consolidated city and county, thus dispensing with the official who had formerly been the city treasurer.

In making this distribution, as will appear from an examination of the language of section 3, supra, the people seem to have taken unusual care to avoid separating into distinct classes those officials who would perform county functions, and those who would perform city functions; but upon city officials, with municipal duties, other functions usually appertain-

ing to the county were imposed, and upon county officials, with ordinary county functions, other duties usually appertaining to the city were imposed, showing clearly a purpose to consolidate into a single agent duties previously imposed upon two or more agents.

So it is palpable from an examination of section 3 of article XX that there was a real consolidation and merger, not only of previously existing municipal and quasi-municipal entities, but of the governmental machinery by which the duties for the several pre-existing entities had been performed.

We concede, as we have always believed, that the city and county of Denver, viewed in certain aspects, is still a county, whereas, viewed in other aspects, it is purely a city. We recognize that the city and county of Denver is one of the legal subdivisions of the state. As such, and wholly apart from its government locally as a city, it must be possible to secure juries, to levy and collect taxes, to probate wills, to collect executions under the general law, and to have performed all of those functions of government necessary to the preservation of the integrity of the state. We do not contend that article XX has destroyed any of the public functions or duties respecting the state and county governments; what we do contend is, that article XX did change the manner and method of selecting the functionaries whose duty it should be to perform the governmental functions ordinarily attaching to county officers.

Probably the spectacle of a chief of police acting as a sheriff had not been witnessed hitherto in this country. Those who are unduly partial in favor of the old, and who are prejudiced against innovation,

could not see how it would be possible for a chief of police to summon jurors or collect an execution. These duties have usually been associated with a sheriff; but that does not mean that the supreme power in the state—the people thereof—may not sever them.

A moment's candid reflection discloses that a function is one thing, and a functionary is a different thing; that an agent is one thing, the duty of the agent is a different thing; that an officer is one thing, the obligation of the officer is a different thing.

Herein lies the fallacy of relator's contention; he utterly fails to discriminate between the function and the functionary, between the agent and the duty imposed upon the agent, between the officer and the obligations of the officer.

We have never contended, and do not now contend, that a single governmental duty, by the adoption of article XX, became subject to local control. During the interim for which the provisional government was made in section 3, the governmental duties in this territory were not different from what they had been before—not different from what they were in other subdivisions of the state. The constitution did not attempt to change these duties; they were not changed, but the obligation of performing them was simply imposed upon the officials in section 3 designated. The state could not suffer, because all duties appertaining to a sheriff, a board of county commissioners and a surveyor, as those terms are usually understood, were to be performed by a chief of police, a city council and a city engineer. The point with the people was to have those duties performed. It was wholly immaterial as to the name by which the functionaries were to be designated.

Now, what section 3 did during the provisional government, and prior to the adoption of a charter under article XX, is merely indicative of what section 2 of article XX declares may be done for the entire future government of the city and county of Denver. Section 2 is as follows:

"The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided: but every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable. If any officer of said city and county of Denver shall receive any compensation whatever, he or she shall receive the same as a stated salary, the amount of which shall be fixed by the charter, and paid out of the treasury of the city and county of Denver in equal monthly payments."

If there ever was a constitutional provision which is so plain as to need no explanation, so unambiguous as to need no interpretation, it is this section 2. In dealing with it, we most earnestly invoke the court to apply the rule of construction announced in *Board of County Commissioners v. Rollins*, 130 U. S., 662.

Applying this rule, no room is left for construction of section 2, *supra*. It means what it says. No other construction is possible. Counsel, however, insist that the court shall read into this section, after the words, "city and county of Denver," the words, "in its character as a city." This destroys its mean-

ing, and is utterly inconsistent with the plan of government instituted by the constitution at the time of the creation of the city and county. If such meaning was to be given to section 2, upon what theory can the action of the people be explained in bringing to an end the terms of office of the old county officials? If relator's contention is correct, why did not article XX continue intact and to the end of the term the old county officers for the new entity, and why did it not simply provide that the city officials of the old city of Denver should become such officials for the city and county in its character as a city until a charter should be adopted and new officers elected thereunder? The contention of counsel is absurd, and convicts the people of being insane in providing for the *ad interim* government as set forth in section 3 of article XX.

Again, what is meant by the language, "*but every charter shall designate the officers who shall respectively perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable?*" This clause must be eliminated if counsel's contention is maintained, and by the decision of the supreme court of Colorado it has been absolutely eliminated. The use of this language demonstrates two propositions—first, that the acts and duties, required of county officers to be done by the constitution and by the general law, will still prevail and must still be performed in the city and county of Denver; second, that there will be no county officers to perform them as the term, "county officers," is usually understood. Because these duties must still be performed, and because there will be no

county officials to perform them, we have the mandatory declaration in the constitution that every charter shall designate the officers who shall respectively perform such acts and duties. Nothing could be more convincing of the proposition that there will be no county officers, as that term is popularly understood, in this territory, than this language. It equally emphasizes the proposition that those duties still appertain within this territory. They must still be performed in the future as in the past; but they are not to be performed by the same agencies that have hitherto performed them, or by agencies selected at the same time or in the same manner. The charter of the city and county of Denver must designate of its officers those who shall perform these duties. It was the performance of the duties in which the people were interested, and not in having them performed by any particular agent, or by an agent selected at any particular time. Section 2 says the officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter, and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided. Then is added this qualification or limitation, namely, that every charter shall designate the officers who shall respectively perform the acts and duties required of county officers to be done by the constitution or the general law, as far as applicable.

This language either means that the officers of the city and county are to be provided for by a charter, and that this charter shall designate of those officers those who shall perform the various govern-

mental functions imposed upon county officers, or else language ceases to have any meaning at all. It means that or it means nothing. Why designate officers of the city and county to perform the duties of county officers if it was intended that county officers in this territory were to be elected in the usual way? There is no possibility of giving any meaning to this section other than that naturally expressed by the words used.

This argument the court below was unable to and did not attempt to answer. The court, therefore, if not in express words, in effect, nevertheless, declared section 2 void upon the ground that if it meant what it said, it would destroy a republican form of government in the city and county of Denver, and that if it meant what it said, the people of the state of Colorado did not have the power or authority, under the constitution and laws of the United States to enact such a constitutional provision. It is not a case of the *construction* of said section; it is a case of *annihilation*. The court in effect says that section 2 can not stand as it is written, because it destroys a republican form of government. If the people of Colorado should amend their constitution so as to abolish the supreme court, that tribunal, under the guise of construction, might declare that such amendment can not stand because, forsooth, to abolish the supreme court of the state of Colorado would be to destroy a republican form of government in that state. Such action could hardly be more absurd than the decision below, which eliminates from the constitution a section which, under the constitution of the United States, the people of Colorado had the power and right to adopt as a part of their organic law.

The supreme court of Colorado, we think, does not seriously controvert the proposition that section 2 means what it says, and that its language clearly authorizes the charter to designate and fix the term of the official who shall perform, in the city and county of Denver, the duties imposed by the constitution and general laws upon county treasurers; but, as we understand the opinion, the court insist that, to give section 2 the meaning which it thus clearly expresses, will be to give it a meaning which will render it invalid. In other words, the court insists that in the city and county of Denver a republican form of government must be maintained, and that to maintain a republican form of government in said city and county, a meaning must be given to section 2 which is different from that expressed by the language in said section used. If section 2 means what it says, counsel for relator argued that in this particular subdivision of the state a republican form of government would pass away. The only alternative is to declare that said section has no meaning—to declare it utterly void.

Until we heard in the lower court this particular contention on the part of learned counsel, it had never occurred to us that the existence of a republican form of government in any wise depended either upon the day that officers are selected by the people to perform the functions of government, or the particular name which should be given to the officers so selected for that purpose. It seemed immaterial, so far as the maintenance of a republican form of government is concerned, whether officials for a subdivision of the state are elected on the first Monday in August, the first Tuesday in November or in the month of

May. A republican form of government is maintained in some states where in each subdivision thereof a board of county commissioners is elected to control the fiscal affairs of the county. A like form of government is maintained in other states where in each subdivision thereof there is constituted what is known as a fiscal court, to control the fiscal affairs of the county. In some states these officials have been elected in August, in others they have been elected in November. In some they are elected for two years, in others for four years. In some parts of this country the subdivisions of a state have been called townships, in others the subdivisions of the state have been caled counties; but in all of the states in this country the supreme power of the state has been and is in the people, subject only to the limitations of the federal constitution, and so long as the supreme power is thus vested, respecting the whole territory of a particular state, it is not believed that a republican form of government is endangered.

In the early history of our government little attention was given in the state constitutions to local government. In the North there existed the New England town; in the South the Virginia county, while in other states a combination of the two existed. The evolution of government, particularly for local purposes, is reviewed at some length and in a most interesting manner by *Thorpe in his Constitutional History of the American People*, volume 2, beginning at page 448. The author in his discussion discloses that Illinois in 1848 incorporated in its new constitution an article on the subject of counties, which he says is the first innovation of this kind. At page 453, he says:

"It left the form of government to the will of the electors. They might choose the township or county type."

The author at page 453 continues:

"What form of local government would prevail in California was for a time uncertain. That it would be composite was assured. The New England township, the Virginia county, the Pennsylvania combination of township and county, and the old Spanish system of local government were the elements to be harmonized. The form was left to the decision of the legislature. A significant change was made in Virginia at this time by the subdivision of each county into districts as nearly equal as possible in territory and population, in each of which four justices of the peace were elected for four years and commissioned by the governor. These comprised the county court. The voters of each county also elected a clerk, surveyor, commonwealth attorney, a sheriff and revenue commissioners. It will be noticed that the recognition of local interests in a southern state constitution was chiefly of judicial interests, and usually by means of a reorganization of the judicial system of the state. On the other hand, in northern states the recognition of local government was chiefly in its administration by supervisors or commissioners—the recognition of the county or town as a distinct body corporate. This difference is well illustrated in the constitutions of Virginia and Michigan of 1880. Virginia recognized the county no further than as a basis of representation and as entitled to separate courts. Michigan organized it as a body corporate, whose economic interests comprised an organic unit. No county could have fewer than sixteen towships, each six miles square, as surveyed by the United States, unless in pursuance of law, and with the consent of a majority of the electors residing within the county.

The legislature might organize any city into a separate county when it attained a population of twenty thousand inhabitants, and without reference to its geographical extent, if a majority of the electors of the county in which the city was situated favored separate organization."

This probably presents the first instance of a plan for the consolidation of a city and county in any of our state constitutions. The scheme has been tried in Missouri and California, and in Washington there is constitutional authority for certain cities to make their own charters. It is upon the authorities of the courts of these three states that counsel essentially relied in the court below. To review the various decisions of these states would unduly extend this discussion.

With the propositions established thereby we have no controversy. Generally we believe they are correct. The provision of the Colorado constitution, however, is essentially different from anything found either in the Washington or Missouri constitutions. The scheme of a consolidated city and county government, however, was embodied in the Missouri constitution, and to that extent, as well as to the extent that provision was made for the separate government of such consolidated city and county, the constitution of that state is not essentially different from the recent amendment to the constitution of the state of Colorado. The portions of the constitution of Missouri thus providing for the consolidation of the city and county government are found in article IX thereof.

The decisions of the supreme court and court of appeals of Missouri which discuss said constitutional provisions are as follows:

State v. Mason, 4 Mo. App., 377.
State v. Finn, 8 Mo. App., 341.
State v. McKee, 69 Mo., 504.
State v. Dillon, 87 Mo., 487.
State v. Bus, 135 Mo., 325.
Kansas City v. Oil Co., 140 Mo., 458.
State v. Police Commissioners, 80 Mo. App., 206.
State v. Lindell Ry. Co., 151 Mo., 162.

Article X of the constitution of the state of Washington presents constitutional authority for the organization of cities, and constitutional authority for certain cities to make their own charter—something of an innovation from the general rule whereby municipal charters are enacted by the state legislature. It is plain, however, from an examination of the said provision of the constitution, that a discussion of no question which could be presented thereunder, can materially aid us in arriving at a conclusion respecting the question in issue. Said constitutional provision, however, is discussed in the following cases:

In re Cloherty, 2 Wash., 137.
City of Tacoma v. State, 4 Wash., 64.
Howe v. Bartow, 12 Wash., 627.
State v. Superior Court, 14 Wash., 604.

Prior to the amendment to the constitution of the state of California in 1896, there was no provision in the constitution of any of these states similar to article XX, and no decision rendered in any of said states prior to 1896 can have any controlling effect upon the real question now in dispute. That a consolidated city and county is both a *city* and a *county*, all of these courts agree. With this position we have no controversy whatsoever. That fact in no wise destroys a republican form of government.

The authorities from the states above mentioned also go to the point that the governmental functions must be performed in the territory embraced by a consolidated city and county as in all other subdivisions of the state. They also establish that the powers of a municipality are such as have been expressly conferred or such as have been conferred by necessary implication.

This brings us to the constitution of the state of California.

The city and county of San Francisco began its existence as a consolidated entity, as we understand it, originally under an act of the legislature of 1856. The constitutional convention of 1878-79, however, made provision for the government of cities. Section 5 of article XI declares:

"The legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township and municipal officers as public convenience may require, and shall prescribe their duties, and fix their terms of office. It shall regulate the com-

pensation of all such officers in proportion to duties, and for this purpose may classify the counties by population; and it shall provide for the strict accountability of county and township officers for all fees which may be collected by them, and for all public and municipal moneys which shall be paid to them, or officially come into their possession."

Section 6 is as follows:

"Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

Section 7 is as follows:

"City and county governments may be merged and consolidated into one municipal government, with one set of officers, and may be incorporated under general laws providing for the incorporotion and organization of corporations for municipal purposes. The provisions of this constitution applicable to cities, and also those applicable to counties, so far as not inconsistent, shall be applicable to such consolidated government. In consolidated city and county governments of more than one hundred thousand population, there shall be two boards of supervisors or houses of legislation—one of which, to consist of twelve persons,

shall be elected by general ticket from the city and county at large, and shall hold office for the term of four years, but shall be so classified that after the first election only six shall be elected every two years; the other, to consist of twelve persons, shall be elected every two years, and shall hold office for the term of two years. Any vacancy occurring in the office of supervisor, in either board, shall be filled by the mayor or other chief executive."

Section 8 authorized any city containing a population of more than three thousand five hundred to frame its own charter in the manner in said section specifically set forth.

It would, perhaps, be proper to observe that some sections above referred to were slightly amended from time to time, but not in a way to be material to the question under discussion. We have referred to the sections as they existed in 1893. Section 8, as we are advised, originally applied only to cities having a population of more than one hundred thousand. Of course, we do not now refer to the amendments of 1896, which we shall here after discuss.

All of the cases cited below for relator from California, except *Martin v. Election Commissioners*, 126 Cal., 404, and *Crowley v. Freud*, 132 Cal., 440, were decided at a time when there was no constitutional provision on the subject in California, or when the provisions were substantially as above set forth.

Numerous previous cases are reviewed at considerable length in *Kahn v. Sutro*, 114 Cal., 316. That action was instituted to restrain the board of election commissioners of the city and county of San Francisco from calling an election for county officers. It was contended that the county government act of 1893 had

no application to the city and county of San Francisco. A demurrer was interposed to the complaint and sustained. It will be noted that section 6 above quoted expressly declares that all charters framed or adopted by authority of the constitution shall be subject to and controlled by general laws. The point was as to whether the general law of 1893, respecting county governments, applied to the city and county of San Francisco. A majority of the court held that it did.

In other words, as the constitution then existed, there was no authority in the city and county of San Francisco to fix the time at which or the term for which county officers should be elected. The court held that the city and county of San Francisco was a municipal corporation, but, viewed in certain aspects, was a county as well. It was argued with a good deal of force, and to the extent of convincing the chief justice and one of the associate justices, that section 7, which provided for one set of officers, authorized the city and county, in its charter, to provide for the time at which county officers should be elected; though, as stated, the majority of the court held that the clause in section 6, which declared that all charters, framed under the authority of said article, should be subject to and controlled by general laws, left the city and county of San Francisco subject to the provisions of the general county act aforesaid, respecting the election of county officials.

A somewhat similar question was before the supreme court of California in *People v. Toal*, 85 *Cal.*, 333, where it was held that article XI of the constitution did not confer authority upon a consolidated city and county, in its charter, to establish a police court.

These decisions and others therein cited led the legislature to propose, and the people to adopt, an amendment to article XI, designated as section 8½ thereof. This amendment, so far as applicable to the question under consideration, is as follows:

"It shall be competent in all charters framed under the authority given by section 8 of article XI of the constitution to provide, in addition to those provisions allowable by this constitution and by the laws of the state, as follows: 1. For the constitutional regulation, government and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which, the judges of such courts shall be elected or appointed, and for the compensation of said judges and of their several clerks and attaches. * * * Where a city and county government has been merged and consolidated into one municipal government, it shall also be competent in any charter framed under section 8 of said article XI to provide for the manner in which, the time at which, and the terms for which the several county officers shall be elected or appointed, for their compensation, and for the number of deputies that each shall have and for the compensation payable to each of such deputies."

In some material respects it will be noted that this amendment is like certain provisions of article XX of the constitution of Colorado. Section 2 of article XX goes a step further in that, instead of expressly providing for county officers to be elected in the city and county of Denver at such time and for such term as the charter may provide, it declares that the *officers themselves shall be such as the charter may provide for.* Section 8½ *supra* delegated to the consolidated city and county in California the power

to provide the time and manner of election, and the term for which county officers should be elected, thus recognizing the officials still as county officers, but making them different from other county officers throughout the state in that their term was to be fixed for a short period or a long period, in the discretion of the city and county; their compensation, instead of conforming to that received by other county officials throughout the state, might be greater or less, as dictated by the city and county; and, instead of being elected in the same manner that other county officials were elected throughout the state, the method was delegated to the city and county. In other words, every matter of detail in securing county officials, such as fixing their compensation, and the time for which they should serve, was delegated by the people of the state of California to the consolidated city and county.

It is apparent from a mere statement of the proposition, that while certain officers of the consolidated city and county were called county officers, they were not, in truth, county officers, in the *same sense* as were other county officials in the various subdivisions of the state. They had to be called county officials, because section 8½ so declared, and they were county officials in the sense that they *performed the governmental functions* ordinarily imposed upon county officials under the constitution and general law of that state; but they were in a class of county officers by themselves, different from all other county officers, in respect to the method of their election, the term of their service, and the compensation which they should receive; but they performed the duties ordi-

narily attaching to county officers and, in this sense, as well as in name, were county officers.

Section 2 of article XX secures to the people of the state of Colorado the same result, so far as the government is concerned, as that attained by section 8½ of article XI of the constitution of California. The city and county of Denver is authorized to give to its officials whatever name it may see proper, to elect them for such term as its discretion dictates, pay them such compensation as the condition of its exchequer may justify, elect or appoint them at such time as the charter may fix, prescribe such qualifications as seem proper; but, to the powers thus conferred, is attached one limitation, and this limitation has precisely the same practical effect in the state of Colorado as was had by that part of section 8½ in California, which expressly provided for the election of county officers. The limitation referred to declares that *every charter shall designate from among the officers of the city and county those who shall respectively perform the acts and duties required of county officers to be done by the constitution and general law, as far as applicable.*

It is the public duties fixed by the general law, the public functions imposed by law and existing throughout the state, that are not subject to local control, and that they are not subject to local control is positively shown by this clause in section 2, which requires the city and county, in its own way, at such time as seems proper, for such compensation as it likes, but always, nevertheless, to designate officials of the city and county upon whom shall continually rest the obligation of performing these public duties and public functions.

It has not been customary, it is true, to delegate such authority to the people of a portion of the territory of a state; but that does not argue that it may not be done. It is an innovation, or would be so regarded in many states; but there is nothing revolutionary about it. Complete provision is made for the doing of everything, and for the performance of every duty required to be done or performed in any other portion of the state.

Since the adoption of section 8½ of article XI of the constitution of the state of California, two important cases involving its construction and validity have been before the supreme court of that state. We refer to *Martin v. Election Commissioners*, 125 Cal., 404, and *Crowley v. Freud*, 132 Cal., 440. An analysis of these cases will show not only that they support our contention, but that the previous cases, most of which are reviewed in *Kahn v. Sutro*, in no wise conflict therewith. It was because of the previous decisions, to which reference above has been made, that section 8½ was adopted. After its adoption provision was made in the charter of the city and county of San Francisco fixing the time for the election of all officers of the city and county, and it was expressly held in both of these cases that under section 8½ it was competent for the city and county to do what said section declared it might do, namely, to fix the times at which, and the terms for which, the several county officers should be elected. It was argued, however, that section 8½ was invalid, as being in conflict with other provisions of the state constitution and as being destructive of a republican form of government. This is in line with the argument of counsel in the case at bar.

In *Martin v. Election Commissioners, supra*, at pages 411 and 412, the court uses the following language:

"It is contended, however, on the part of the appellants that the provisions of said amended section 8½ under consideration can not be carried out, for the reason that it would conflict with the general law of the state establishing a uniform system of county and township government; in other words, that the law (and a freeholders' charter adopted as provided for in the constitution is a law of the highest grade) can not be passed, although in pursuance of express power granted by the constitution, because it may, perhaps, infringe upon some other law. The rule of construction invoked by appellants seems to be that a proposition in a law or constitution in reference to a particular matter is inoperative and void if it be inconsistent with the general provisions of said law or constitution. The direct opposite is the true construction in such cases.

"'The more specific provision controls the general, without regard to their comparative dates; the two acts operating together, and neither working the repeal of the other.' (*Bishop's Written Laws*, sections 112-26; *Desmond v. Dunn*, 55 Cal., 247; *Dwarris on Statutes*, 765; *Cooley's Constitutional Limitations*, 63; *Commonwealth v. Council of Montrose*, 52 Pa. St., 391; *Coxe v. State*, 144 N. Y., 396; *People v. Keller*, 157 N. Y., 97; *State v. Kelly*, 34 N. J. L., 75; *McGavisk v. State*, 34 N. J. L., 509; *State v. Inhabitants of Trenton*, 38 N. J. L., 64; *Crane v. Reeder*, 22 Mich., 323.)

"Under this rule of construction it would be immaterial whether the general county government act applies to the county of San Francisco or not; for although said new section 8½ of article XI may conflict with other sections of the same article providing for a uniform system of county and township govern-

ment, it would still be valid as to the particular cases for which it is intended, for in such cases the particular and the general both stand together—neither abrogates the other—the former furnishing the rule for the freeholders' charter, the latter for all other cases.

"But the act establishing a uniform system of county and township government does not, and never has, applied to the county of San Francisco, in the sense claimed by the appellants. The first section provides that the several counties of the state, as they now exist, and such others as may be hereafter organized, are bodies corporate and politic, and, as such, have the power specified in said act; among these are the power to sue and to be sued, to purchase and hold land within its limits, to make contracts, and purchase and hold such personal property as may be necessary to the exercise of its powers, to manage and dispose of its property as the interests of its inhabitants may require, to levy and collect such taxes as are authorized by law. The county of San Francisco, as already shown, since the passage of the consolidation act, has never, as such, owned or possessed any property or performed any of the acts of a corporate body. Further, the general law provides that 'each county must have a board of supervisors consisting of five members.' The county of San Francisco never has had such a board, or any board of supervisors, since the consolidation act. The general county government act also provides for justices of the peace and constables in the several townships of the county, and there are no justices of the peace or constables in the townships of the county of San Francisco, since there are no townships in San Francisco. *In fact, it is too obvious for question or argument that the general law establishing a uniform system of county government does not apply to the city and county of San Francisco.* Further, section 8 of article XI, as it now stands, declares that when said charter is approved as therein provided 'it shall become the charter of such city, or if such city be consolidated with a county,

then for such city and county, and shall become the organic law thereof, and supersede any existing charter, and all amendments thereof, and all laws inconsistent with such charter.' As the section originally stood it read: 'All special laws inconsistent with such charter.' The purpose of the amendment is in line with other amendments to the other sections of the article in question, *and would seem to remove all doubt that such charters are not subject to existing laws, whether general or special.*"

In Crowley v. Freud, *supra*, it seems to have been urged that *Martin v. Election Commissioners* overruled *Kahn v. Sutro*. The court disclaims having had any such intention, but explains that the difference in the two cases arises not because of a change in the view of the court, but because *Kahn v. Sutro* was decided before the adoption of section 8½, whereas *Martin v. Election Commissioners* was decided *after its adoption*. *Kahn v. Sutro*, therefore, may be regarded as the law in California when the constitution exists as it did prior to 1896; but *Martin v. Election Commissioners*, and *Crowley v. Freud*, declare what the law is under the existing amendment to the constitution. The court, in *Crowley v. Freud*, at page 442, says:

"The Martin case was brought by certain county officers in San Francisco, upon the theory that the adoption of section 8½ had not changed the law declared in Kahn v. Sutro as to the time of their election and their terms of office; and this court held in the Martin case that those things had been changed by section 8½, because it declared that it was competent to provide in the charter of a consolidated city and county government 'for the manner in which, the times at which, and the terms for which the several

county officers shall be elected.' This was the only question involved and the only question decided—the only question to which the minds of the court were directly called and upon which they directly acted. The contention of appellants is based mainly upon one or two expressions to be found in the opinion of the Martin case. One of these, and the main one, is as follows: 'But the act establishing a uniform system of county and township governments does not, and never did, apply to the county of San Francisco, *in the sense claimed by the appellants.*'

"This, however, is not saying that it does not apply *in any sense.* And what *was* the sense in which appellants in that case claimed such application? They 'claimed,' briefly stated, as follows: section 6 of article XI provides that all municipal charters shall be, except in municipal affairs, 'subject to and controlled by general laws;' county officers not being within the exception of 'municipal affairs,' the county government act, which provides for their election, time of office, etc., 'controls the provisions of the charter on that subject;' and section 8½ can be kept out of conflict with section 6 only by a construction which is stated in appellants' brief in the Martin case in this language: 'The only construction admissible, therefore, is that which renders section 8½ subject to section 6 by permitting a charter to provide for the appointment, election, tenure and compensation of county officers and their deputies, only *where there is no general law on the subject;* the charter to be superseded in that respect whenever a general law is adopted.' They also contend that section 8½ could not be legally adopted as an 'amendment,' and that what was attempted thereby could only be done through a general revision by a constitutional convention. And they argued that, for the foregoing reasons, and for many others which were urged, section 8½ is not an existing amendment, and therefore the county government act applies to San Francisco *for all purposes.* The above views of counsel show

the application of the county government act to San Francisco, 'in the sense claimed by the appellants.' But the court did not agree with these views, and held that section 8½ was a valid amendment, and that by its express terms it provides for the election and terms of office of the county officers of the city and county of San Francisco; and it is with respect to the contentions of appellants in the Martin case that the expression above quoted must be taken. And a somewhat broader expression in the opinion, following closely after the one above noticed, must be taken as subject to the same qualification as the first. It is nowhere in the opinion stated that there are no county officers in the city and county of San Francisco; on the other hand, it recognizes the existence of such officers, as section 8½ itself does. For instance, in the constitutional convention, Judge Hager, in replying to the objection that consolidated governments multiplied offices and increased expenses, said that the opposite was the result, and referred to the consolidated government of San Francisco as sustaining his position; and in the opinion of the Martin case, the following, from his remarks, is quoted: 'We have a sheriff who is sheriff of *the county* and of the city. * * * We have a tax collector and we have an auditor that acts *for both;* formerly, we had one *for each.*' Whether there were county officers in San Francisco was not a question in the Martin case, and there was no pretense of overruling *Kahn v. Sutro* on that subject; the only question involved was, When are *county officers* to be elected? and what are their terms of office? *Miller v. Curry*, 113 Cal., 644, is to the same effect as *Kahn v. Sutro.*

"The fact that in a consolidated city and county there is neither a separate county governmental organization, nor a separate city governmental organization, each distinct from and entirely independent of the other—as there is in ordinary counties and cities—was fully recognized in *Kahn v. Sutro* as in *Martin v. Election Commissioners.* There is no conclusive-

ness in the argument that there can be no county officers for a consolidated government, because to hold otherwise would be to violate the original section 4 of article XI of the constitution, which contemplates a 'uniform system of county governments; for other provisions of the constitution, mostly amendments, and particularly section 8½, which are specific provisions on the subject, allow such want of uniformity in the case of a consolidated city and county government, and expressly apply provisions to county officers in such consolidated government which do not apply to officers in other counties.

"Not only is the state itself interested in county officers as parts of its necessary governmental machinery, but the people of any county of the state are interested—and some of them are frequently deeply interested—in county officers, such as sheriffs, recorders, clerks, etc., in other counties. The functions of such officers are general, not municipal. *And while, in the American system of state governments, the people of the whole state have generally kept in their own hands control over such important public governmental agencies as county officers; still, if they choose to yield up part of that control by adopting a constitutional amendment such as section 8½, there is no apparent reason why they may not do so, unless the amendment should be so revolutionary as to be destructive of a republican form of government, as the same is understood in this country. Section 8½ can not be said to be of that character.*"

Neither can it be said that section 2 of article XX is of that character. However unusual it may be in the history of our state governments, there is nothing destructive of a republican form of government in such delegation of power. It is plain that the officers designated, as appellee has been, to perform governmental duties are as truly state agencies when

in the performance of those duties as is any county official when performing like duties. A study of this opinion will show that in reality the same powers were conferred upon the consolidated city and county in California as are conferred in the city and county of Denver—the power to fix the manner of election, the term of office and the compensation of those officials who should perform county duties. It is true that the language of section 2 of article XX would authorize the city and county of Denver to follow the example set by the people of the whole state in section 3, and give to the officials who perform county functions a different name from that which prevails throughout the state, and we have no doubt at all that it was perfectly competent for that to be done; but as a matter of fact it has not been done, so far as the case at bar is concerned. The official who performs the acts and duties required of county treasurers under the constitution and general law of the state is called the treasurer of the city and county of Denver. He performs the duties imposed upon county treasurers by the constitution and general law of the state. He does this in obedience to a provision of the charter itself enacted in obedience to the mandate of section 2 of article XX.

If these duties, common to every portion of the state, are performed, the government is kept intact; its integrity is maintained; its republican form continues; and it is not material when such officials are elected, for what term they are elected, what compensation they receive, or by what name they may happen to be designated.

Let it never be forgotten that a clear discrimination exists between the function and the functionary;

between the office and the duty pertaining to the office. This distinction is not a mere metaphysical abstraction. It was clearly expressed by the people of this state when, in section 3 of article XX, they called the officer who should perform the duties of sheriff a chief of police, when they called the officers who should perform the duties of a board of county commissioners the council of the city and county of Denver, when they called the officer who should perform the duties of a surveyor for said city and county of Denver an engineer; and the distinction was clearly recognized in section 2 of article XX when the people of the state declared that the city and county of Denver should have just such officers as by election or appointment it should provide for in its charter; and when in another clause of section 2 it was declared that from among the officers so to be selected the charter should always designate those who should perform the acts and duties required of county officers under the constitution and general law of the state.

The supreme court of Colorado seems to have assumed that the existence within a state of what it terms an *imperium in imperio*, would *ipso facto* destroy a republican form of government. One of the reasons apparently assigned by the lower court for holding that it was not within the power of the people of Colorado to amend their constitution by the adoption of article XX, and particularly section 2 thereof, is that the effect would be to create a government within a government. This demonstrates the erroneous theory of the court below with respect to the power of the people of a state under the constitution of the United States.

In the City of St. Louis v. Western Union Telegraph Co., 149 U. S., 467, this court, speaking through Mr. Justice Brewer with respect to the government of the city of St. Louis, in the state of Missouri, remarked:

"The city is in a very just sense an '*imperium in imperio.*' Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter."

Notwithstanding the condition so found to exist in the city of St. Louis, there is no intimation from this court that the people of the state of Missouri had exceeded their authority under the constitution of the United States, or that a republican form of government in that state had been destroyed.

In this connection it should be remembered that the people of the individual states have full authority and power to provide for just such offices as they may see proper, to serve for a long term or a short term, according to their own judgment or caprice, to serve for life or for stated intervals, to be appointed, elected or otherwise selected according to the will of the people of the state, and that in all of these matters of detail, the local state government is free and unrestrained by the constitution of the United States.

The power exists in the people to provide any character of government they may wish, provided only it is republican in form. It may adopt one system of laws for one portion of the state, and entirely a different system of laws for another subdivision of the state. The people may elect or otherwise choose the officials for one county at one time, and for a particular term, and may select the officials for other

subdivisions of the state at an entirely different time, and for a wholly different term. As was said by this court in Bowen v. Lewis, 101 U. S., 22:

"There is nothing in the constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the constitution of the United States to prevent its doing so."

If this be true, and no lawyer will question the soundness of the doctrine announced, wherein can it be said that a republican form of government is in any wise endangered when the people of the state of Colorado say to the people of one of the legal subdivisions of the state, as the city and county of Denver:

"We, through our constitution and the laws enacted by our general assembly, have provided that throughout the entire territory of the state certain governmental duties shall appertain and be performed, and in all other subdivisions of the state we have provided for the election of officers to perform these duties; but we have decided to and do hereby delegate to you the power to select in such manner as you may adopt, for such compensation as you may fix, and for such term as may meet with your approval, your own officers. The mandate in the constitution which we have adopted, requiring officers in each county to be elected at a certain time, shall no longer apply to you. The statutes fixing the compensation of county officers, and the term of those county officers, and the qualifications thereof, shall not apply

to you. All of these matters are to be determined by the people within your own territory. You may have just such officers as you choose, designating them by whatever name that suits the taste of your people. You may pay them a small or liberal compensation, according to your own whims or ability. We demand of you but one thing, and that is, that you shall designate from among the officers for whom you provide, those who shall respectively perform all of those acts and duties required of county officers to be performed under our constitution and general laws. For example, under our constitution and general laws, duties have been prescribed as attaching to the office of county treasurers in the various counties of the state. Those duties are well defined in our laws. We shall not require you to have a treasurer at all in your portion of the state, but we do demand that you shall designate some officer in your territory whose duty it shall be under your designation to perform those acts and duties which the constitution and general laws impose upon county treasurers. We are perfectly willing that these duties shall be performed by an officer of any name, and that the office shall be created by your charter. The matter of designating the agent, and paying this agent, we delegate absolutely to you. The only thing we demand of you in this respect is, that upon some officer, selected in some way, for some period of time, by you, these duties shall be imposed."

This, in brief, is precisely what has been done by the people of Colorado. In section 8 of article XX they expressly declare that the constitutional provisions of the state, in conflict with article XX, shall have no application to the matters and things provided for in said article XX, and in section 2, in the clearest sort of English, the powers of the character above outlined have been conferred, reserving always

the limitation therein expressly stated, that the duties attaching to county officers shall be performed within the territory by some agency selected or elected or otherwise designated by the city and county. This, however, the supreme court of Colorado has decided that the people of that state had no power to do, and the reasons assigned for such ruling is that the delegation of such power to one of the subdivisions of a state would necessarily create an *imperium in imperio*, and that thereby a republican form of government would be abolished.

The decision below is obviously erroneous, deprives the people of the state of Colorado of one of the rights guaranteed to them by the constitution of the United States, and if it is allowed to stand as a correct announcement of the law, it will be rendered possible for a state court, in the most arbitrary manner, to nullify any constitutional provision which the people of the state may see proper to enact, although in such enactment they keep themselves clearly within the limitation fixed by the constitution of the United States.

To the end that such a rule may not be established, and perpetuated as a precedent, we have appealed to this high tribunal with the confident belief that the judgment of the supreme court of Colorado will be reversed.

Respectfully submitted,

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